90-368

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

In Re:
SHELDON BARUCH TOIBB

Petitioner,

STUART J. RADLOFF, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SHELDON BARUCH TOIBB
8640 Olive Boulevard
Suite A
University City, Missouri
63132-2513
(314) 567-1491

Pro Se

52

QUESTION PRESENTED

IS AN INDIVIDUAL NON-BUSINESS DEBTOR ELIGIBLE FOR REORGANIZATION RELIEF UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE?

PARTIES

Petitioner Sheldon Baruch Toibb is an individual debtor who has filed for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C., Chapter 11. Petitioner's Chapter 11 case was dismissed, sua sponte, by the United States Bankruptcy Court for the Eastern District of Missouri by reason of his alleged ineligibility for Chapter 11 reorganization relief.

Respondent Stuart J. Radloff is the appointed trustee in petitioner's original bankruptcy case. He has been cited herein as a nominal respondent, although the dismissal order being appealed from herein was neither initiated by him or by any adverse party, nor defended by any party throughout the lower appellate court proceedings.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below 2

Statement of Jurisdiction 3

Statutes Involved 3

Statement of the Case 5

Reasons for Granting the Writ 8

Conclusion 14

Appendices: A-1

A. Opinion of the United States Court of Appeals for the Eighth Circuit filed May 2, 1990 ..... A-2

B. Order of the United States Court of Appeals for the Eighth Circuit denying rehearing en banc filed June 8, 1990 ..... A-7

C. Order and Memorandum Opinion of the United States District Court for the Eastern District of Missouri affirming the order of the United States Bankruptcy Court dismissing debtor's Chapter 11 reorganization case A-8

D. Order and Memorandum Opinion of the United States Bankruptcy Court for the Eastern District of Missouri dismissing debtor's Chapter 11 reorganization case A-17

TABLE OF AUTHORITIES

Cases:

Wamsganz vs. Boatmen's Bank of DeSoto, 804 F.2d 503, 505 (8th Cir., 1986) 6,8,9,13

In re Moog, 774 F.2d 1073 (11th Cir., 1985) 9,10,11

Warner vs. Universal Guardian Corporation, 30 B.R. 528 (BAP 9th Cir., 1983) 10,11

Grundy Natl. Bank vs. Short, 80 B.R. 802 (W.D. Va., 1987) 10

In re Little Creek Development Co., 779 F.2d 1068, 1073 (5th Cir., 1986) 10

In re Markunes, 78 B.R. 875 (Bkrtcy. S.D. Ohio, 1987) 10

In re McStay, 82 B.R. 42 (Bkrtcy. E.D. Pa., 1988) 10

In re Russell, 60 B.R. 42 (Bkrtcy. W.D. Ark. 1985) 10

Statutes

28 U.S.C. §1254(1) 3

11 U.S.C. S109(b) and (d) 3,4,8

Miscellaneous

91 Commercial Law Journal 234 (1986) ... 12

No

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

In Re:
SHELDON BARUCH TOIBB
Petitioner,

STUART J. RADLOFF, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Sheldon Baruch Toibb, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the judgment of the Court below which judgment affirmed the dismissal of petitioner's Chapter 11

reorganization case.

OPINIONS BELOW

This opinion of the United States Court of Appeals for the Eighth Circuit is appended hereto as Appendix A. The order denying petitioner's Petition for Rehearing en banc is appended hereto as Appendix B. To petitioner's knowledge, neither the opinion nor the order have yet been reported. The orders and opinions of the District Court and the Bankruptcy Court are appended hereto respectively as Appendices C and D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 2, 1990, affirming the Bankruptcy Court's dismissal order of August 1, 1988. The Court of Appeals denied a timely motion for rehearing en banc on June 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Petitioner raises issues with respect to his claimed statutory right to seek reorganization under Chapter 11 of the United States Bankruptcy Code (Title 11 U.S.C.). Section 109 of the Code, which sets forth the eligibility requirements for relief under the various chapters of the Code provides, in pertinent part:

"§109. Who may be a debtor

.....

(b) A person may be a debtor under chapter 7 of this title only if such person is not-

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

.....

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a

railroad may be a debtor under chapter 11 of this title."

STATEMENT OF THE CASE

This case originated under the jurisdiction of the United States Bankruptcy Court for the Eastern District of Missouri pursuant to 28 U.S.C. §1334, 151 and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. Petitioner Sheldon Baruch Toibb (hereinafter referred to as the "Debtor") filed a Voluntary Chapter 7 petition on November 18, 1986. On October 2, 1987, upon Debtor's motion and by leave of Court, Debtor converted his case to one under Chapter 11 of the Code. Thereafter, on March 8, 1988, the Bankruptcy Court, sua sponte entered an Order to show cause why the Debtor's Chapter 11 case should not be dismissed

for failure to qualify as a Chapter 11 debtor.

A show cause hearing was subsequently held, during which the Debtor was questioned by both counsel and Court as to his economic and business related activities. Following the hearing, the Court issued its finding that the Debtor was not engaged in any "ongoing business which satisfies the Chapter 11 eligibility requirements as delineated in the Eighth Circuit's Wamsganz case" and hence not eligible for Chapter 11 reorganization. (See Appendix D, Memorandum Opinion.) Although Debtor contended that Chapter 11

relief is not limited to business debtors[1], the Court nevertheless dismissed his reorganization case.

Said dismissal order was thereupon appealed to both the United States District Court for the Eastern District of Missouri and subsequently to the Eighth Circuit Court of Appeals, wherein the dismissal orders were subsequently affirmed.

---

1. Debtor has also maintained in all prior Court proceedings that he was, in fact, engaged in business. However, for the purposes of this petition, Debtor concedes that the Bankruptcy Court's finding will not be set aside and that, therefore, he would be considered a non-business debtor by the Court.

REASONS FOR GRANTING THE WRIT

This case provides the Court with an excellent and expedient opportunity to resolve a conflict between several of the Circuit Courts of Appeals as to whether an individual, non-business debtor, who would otherwise qualify as a Chapter 7 debtor under the Bankruptcy Code, is also eligible to seek a Chapter 11 Reorganization. Although the statutory language of §109(d) seems fairly straightforward as to the question of who would qualify, several Courts have gone beyond the literal language of that section and have concluded that individuals not engaged in business are ineligible. Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503, 505 (8th Cir., 1986).

The Wamsganz decision is based upon the Eighth Circuit's analysis of the legislative history underlying the Bankruptcy Reform Act of 1978, Pub. L. 95-598. The Eighth Circuit's analysis of that history led the court to conclude that although there is no explicit language in the Bankruptcy Code limiting the use of Chapter 11 to only those debtors not engaged in business, it was nevertheless Congress' intent to exclude non-business debtors from eligibility. As such, the Eighth Circuit had few reservations in holding that non-business debtors are not eligible for Chapter 11.

The Eleventh Circuit Court of Appeals has taken a contrary view on the issue of non-business debtor eligibility. In In re Moog, 774 F.2d 1073 (11th Cir., 1985), the Court unequivocally held that non-business

debtors are entitled to seek relief under Chapter 11.

The Court recognized that although Congress contemplated that Chapter 11 would be primarily used by business debtors, it did not enact or intend to enact statutory language which deprived non-business debtors of eligibility.

The Moog holding has been followed by numerous bankruptcy and district courts. See e.g. In re Little Creek Development Co., 779 F.2d 1068, 1073 (5th Cir., 1986); In re Russell, 60 B.R. 42 (Bkrtcy. W.D. Ark., 1985); In re Markunes, 78 B.R. 875 (Bkrtcy. S.D. Ohio, 1987); In re McStay, 82 B.R. 42 (Bkrtcy. E.D. Pa., 1988); Grundy Natl. Bank v. Short, 80 B.R. 802 (W.D. Va., 1987). Additionally, the Ninth Circuit Court of Appeals' Bankruptcy Appellate Panel has also, in effect,

adopted the Moog decision in its dicta in Warner v. Universal Guardian Corporation, 30 B.R. 528 (BAP 9th Cir., 1983). Thus, a genuine conflict exists between the Circuit Courts of Appeal as to the eligibility of non-business debtors for Chapter 11.

The importance of resolving this conflict is encompassed by both practical and theoretical aspects. Unlike many intercircuit conflicts which may often deal with issues of a procedural or evidentially nature, this case touches on the availability of a substantive statutory remedy to a presumably large class of persons.

If the Court herein does not see fit to grant Certiorari, the denial of Certiorari would leave debtors in many parts of the country with a statutory

bankruptcy remedy that debtors in other circuits do not have. The existence or nonexistence of that remedy is a factor which each and every attorney practicing in the field of bankruptcy law must take into account in advising his client, particularly those who may be ineligible for Chapter 13 relief or cannot formulate a feasible plan within the constraints of that chapter of the Bankruptcy Code. The issue presented herein is certainly one which has been oft discussed in affected legal circles. See e.g. "Consumer Chapter 11 Proceedings: Abuse or Alternative?", 91 Commercial Law Journal 234 (1986). It is one which lacks the burdensome complexity of many issues brought before this Court, and as such, could seemingly be resolved once and for all by the Court in an expedient and

unequivocal manner. Above all, it would put all debtors across the country on a uniform plane.

For the foregoing reasons, petitioner respectfully submits that this Court should issue its Writ of Certiorari both to correct the conflict that exists between the Circuits regarding the availability of Chapter 11 to non-business debtors and to correct the Eighth Circuit's erroneous declaration and interpretation of the law as stated in Wamsganz.

CONCLUSION

For all of the above reasons, petitioner respectfully submits that this Court's Writ of Certiorari should issue to review the decision of the Eighth Circuit.

Respectfully submitted,

SHELDON BARUCH TOIBB
8640 Olive Boulevard
Suite A
University City, MO 63132-2513
(314) 567-1491

Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120

In re Sheldon Baruch Toibb, Debtor	* On Appeal from * the United * States District * Court for the * Eastern District * of Missouri
Sheldon Baruch Toibb, Appellant	* (PUBLISHED)

Submitted: April 12, 1990

Filed: May 2, 1990

Before ARNOLD, Circuit Judge, ROSS, Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Sheldon Baruch Toibb appeals the District Court's affirmance of the Bankruptcy Court's order dismissing his petition for reorganization under Chapter 11 of the Bankruptcy Code. We affirm.

Mr. Toibb filed a petition in bankruptcy under Chapter 7 of the Code in November of 1986. He then filed a motion to convert his bankruptcy proceeding to one under Chapter 11 eleven months later, and the Bankruptcy Court[1] granted the motion. On March 8, 1988, the Court issued an order to show cause why debtor's case should not be dismissed for Mr. Toibb's failure to qualify as a Chapter 11

---

[1]The Hon. Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri.

debtor. The Court, after holding a hearing on the matter, found that debtor was not engaged in an ongoing business, as required to qualify for Chapter 11 relief under Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503 (8th Cir. 1986). It then ordered debtor to convert his case back to a Chapter 7 proceeding within 10 days, or the case would be dismissed. Mr. Toibb then appealed the Bankruptcy Court's decision to the District Court,[2] where the decision was affirmed.

Mr. Toibb now appeals to this Court from the District Court's affirmance. He

---

[2]The Hon. Stephen M. Limbaugh, United States District Judge for the Eastern and Western Districts of Missouri.

argues that the Bankruptcy Court erred (1) in dismissing his case sua sponte, without any such request from his creditors, (2) alternatively, by holding that Chapter 11 relief is available to businesses only; and (3) by finding that he was not engaged in an ongoing business for the purposes of eligibility under Chapter 11. We conclude that the Bankruptcy Court did have authority to dismiss the proceeding sua sponte, and that the Bankruptcy Court was controlled by Wamsganz, 804 F.2d 503. We can also find no error in the Bankruptcy Court's finding that Mr. Toibb did not qualify as a business entitled to Chapter 11 protection.

Affirmed. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120EM

In Re:	*
	* Order Denying
Sheldon Baruch Toibb,	* Petition for
Appellant	* Rehearing with
	* Suggestion for
	* Rehearing
	* En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 8, 1990

Order Entered at the Direction of the Court:

/ss/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	)	
	)	
SHELDON BARUCH TOIBB,	)	No. 88-2026 C (5)
	)	
Debtor.	)	

ORDER

In accordance with the Memorandum filed today,

IT IS HEREBY ORDERED that the Order of the United States Bankruptcy Court for the Eastern District of Missouri dismissing Debtor's Reorganization Case under Chapter 11 of the Bankruptcy Code is AFFIRMED.

Dated this 19th day of May, 1989.

/ss/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	)	
	)	
SHELDON BARUCH TOIBB,	)	No. 88-2026 C (5)
	)	
Debtor	)	

MEMORANDUM

This cause is before the Court on the appeal of Debtor Sheldon B. Toibb from an order of the United States Bankruptcy Court for the Eastern District of Missouri.[1] On August 1, 1988, the

---

1 The Honorable Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri.

bankruptcy court entered an order giving Debtor 10 days to convert his case from a Chapter 11 proceeding to one under Chapter 7 of the Bankruptcy Code. Upon Debtor's refusal to convert the case, the court ordered the case dismissed. Debtor appeals the bankruptcy court's decision, arguing that the court did not have the authority to dismiss the case sua sponte or, alternatively, that the court improperly dismissed his case because he had two ongoing businesses that qualified for protection under Chapter 11. This Court has appellate jurisdiction of bankruptcy matters pursuant to 28 U.S.C. § 158(a).

The bankruptcy court's findings of fact are not to be overturned unless they are clearly erroneous. Bankr. R. 8013. Its conclusions of law, however, are subject to de novo review. In re Martin,

761 F.2d 472, 474 (8th Cir. 1985). The facts of this case are set forth fully in Judge Schermer's memorandum opinion. Briefly, Debtor was a 24% shareholder and a consultant to Independence Electric Corporation (IEC), a business engaged in the production and marketing of hydroelectric power. In April of 1985, Debtor's consultancy was terminated. Debtor attempted to continue as a consultant for other businesses in the energy field, but without much success.

In November of 1986, Debtor filed a Chapter 7 petition, apparently upon the belief that his stock in IEC was worthless. Debtor claims that in 1987 he learned that IEC was an ongoing business and he hoped to become a consultant once again. In addition to Debtor's work as an energy consultant, he has been retained as a fund raiser by at least three charitable

organizations since May of 1987. Debtor's fund raising agreements typically provided that he would receive a fixed percentage of the funds he raised, usually 10 to 20 percent. Debtor disputes the bankruptcy court's finding that he received full reimbursement for any expenses he incurred in connection with the fund raising.

A motion to convert the case to one under Chapter 11 was made and granted on October 2, 1987. On March 8, 1988, Judge Schermer issued an order to show cause why Debtor's Chapter 11 case should not be dismissed for Debtor's failure to qualify as a Chapter 11 Debtor. After a hearing on the matter, Judge Schermer ruled that Debtor did not qualify as a Chapter 11 Debtor because he was not engaged in an ongoing business as required by Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503,

505 (8th Cir. 1986). This appeal followed the bankruptcy court's decision.

Debtor first challenges the bankruptcy court's authority to dismiss the case sua sponte. Prior to November 1986, there was a dispute among bankruptcy courts whether the court had the inherent power to dismiss a case sua sponte. See In re Moog, 46 B.R. 466, 468 (Bankr. N.D. Ga. 1985); In re Cricker, 46 B.R. 229 (Bankr. N.D. 1985); In re Warner, 30 B.R. 528 (9th Cir. BAP 1983). In 1986, Congress amended section 105(a) of the Bankruptcy Code to express its intent not to exclude the court from acting when a provision calls for action by a "party in interest." Section 105(a) now reads:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an

> issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of discretion.

11 U.S.C. § 105(a).

The amendment became effective November 26, 1986. Since that date, the courts are in agreement that the authority of a bankruptcy court to dismiss or convert a Chapter 11 case sua sponte is absolute. In re Bayou Self, Inc., 73 B. R. 682 (Bankr. W.D. La. 1987); In re Rubenstein, 71 B.R. 777 (9th Cir. BAP 1987). Therefore, Debtor's contention that the court erred in dismissing his Chapter 11 case sua sponte is without merit.

Debtor's second argument is that his case should not have been dismissed because he had two ongoing businesses that

qualified him as a Chapter 11 Debtor. The bankruptcy court's determination that Debtor was not engaged in a business under the Wamsganz standard is subject to review under the clearly erroneous standard. The bankruptcy court considered Debtor's argument that he engaged in two businesses: energy consulting and fund raising. The court noted that Debtor had not performed energy consulting services at least since October 2, 1987, the date Debtor's case was converted to a Chapter 11 proceeding. The court's ruling recognizes that the mere possibility of performing those services in the future is not enough to constitute an ongoing business. Similarly, the court determined that Debtor's fund raising endeavors were only a temporary occupation and that it did not qualify as a business under Chapter 11. The bankruptcy court's

determination that Debtor was not engaged in an ongoing business which satisfied the Chapter 11 eligibility requirements as set forth in the Wamsganz case was not clearly erroneous. The opinion of the bankruptcy court dismissing Debtor's Chapter 11 case must be affirmed.

Dated this 19th day of May, 1989.

/ss/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
SHELDON BARUCH TOIBB,	)	Case No. 86-02881-BSS
	)	
Debtor	)	

At Saint Louis, in this District, this 1st day of August, 1988.

For the reasons set forth in the Memorandum Opinion issued this date, it is hereby

ORDERED that Sheldon Baruch Toibb, the Debtor in this case, shall be granted ten (10) days from the date of this Order to reconvert this case to one under Chapter 7 of the Bankruptcy Code.

IT IS FURTHER ORDERED that if no such conversion is received within the ten (10) day period, this case shall be dismissed.

/ss/ Barry S. Schermer
BARRY S. SCHERMER
UNITED STATES BANKRUPTCY JUDGE

Copy mailed to:

Sheldon Baruch Toibb
Debtor
8640 Olive Boulevard - Apt. A
St. Louis, Missouri 63132

Audrey G. Fleissig
Attorney for Debtor
720 Olive Street - 24th Floor
St. Louis, Missouri 63101

Stuart J. Radloff
Trustee
7777 Bonhomme Avenue - 14th Floor
Clayton, Missouri 63105

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
SHELDON BARUCH TOIBB,	)	Case No.
	)	86-02881-BSS
Debtor	)	

MEMORANDUM OPINION

INTRODUCTION

Sheldon Baruch Toibb, (hereinafter the "Debtor"), filed a Voluntary Chapter 7 Petition on November 18, 1986. On October 2, 1987, the Debtor moved and was allowed to convert his case to one under Chapter 11 of the Bankruptcy Code. On March 8, 1988, this Court entered an Order to show cause why the Debtor's Chapter 11 case should not be dismissed for failure to qualify as a Chapter 11 debtor. At the hearing of this matter the Debtor and Debtor's counsel appeared.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §1334, 151 and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" which the Court may hear and determine pursuant to 28 U.S.C. §157(b)(2)(A) and (O).

FACTS

The Debtor received his Bachelor of Arts degree in Political Science from Yeshiva University in 1972. In 1975 he received his Juris Doctor degree from Washington University; and in 1976 he received a Master of Law degree from Georgetown University. From 1976 through 1980 the Debtor was engaged in the private practice of law. In 1980 he joined the Office of General Counsel of the Federal

Energy Regulatory Commission (hereinafter "FERC").

Independence Electric Corporation (hereinafter "IEC"), was formed in March, 1983 for the purpose of producing and marketing electric power. The Debtor is a 24% shareholder of the issued stock in the company. Pursuant to a letter agreement dated March 15, 1983, the Debtor was retained as a consultant to IEC earning an annual fee of $50,000.00 plus a $1,735.00 monthly expense allowance. After working at the IEC offices in 1983, the Debtor worked out of his home beginning in January of 1984 and in April of 1985 the consulting agreement was terminated.

From April of 1985 to July of 1986 the Debtor sought other consulting work in the energy field and attempted to find a "white knight" to acquire IEC and reinstate the consulting agreement.

During the period of time between April, 1985 and September 1986, the Debtor had three sources of income: 1) his parents, who provided his primary support from May 1986 to May 1987; 2) his friends; and 3) payments received in June of 1985 from consulting work performed from IEC in March and April of 1985. In July of 1986 the Debtor moved to St. Louis and on November 18, 1986 he filed a Voluntary Chapter 7 Petition. A Motion To Convert the Debtor's case to one under Chapter 11 was made and granted on October 2, 1987.

Beginning in May of 1987, the Debtor was retained as a fund raiser by the St.Louis Rabbinical College. His compensation is 20% of all amounts raised, plus his expenses. Since January, 1988 the Debtor has also been retained as a fund raiser for the The Food Bank and Jerry S. Stein Charities, Inc., and is to

be paid 10% of all amounts raised, plus his expenses.

The Debtor's schedules reflect that he has debts totaling $141,819.97, of which $137,619.34 are unsecured. The Debtor's testimony further revealed that approximately one-third of his total debt was incurred in connection with his work at IEC or his education.

DISCUSSION

The issue presented in this case is whether Sheldon Baruch Toibb is an eligible debtor under the provisions of Chapter 11 of the Bankruptcy Code. The eligibility of a Chapter 11 Debtor has been addressed by several United States Appellate Courts including the Eighth Circuit. Although the Eleventh Circuit Court of Appeals has allowed in certain circumstances debtors not engaged in business to seek relief in a Chapter 11

proceeding, (In re Moog, 774 F.2d 1073 (11th Cir. 1985); the Fifth, Sixth and Eighth Circuits have rejected this position. In the case of Wamsganz vs. Boatmen's Bank of DeSoto, 804 F.2d 503, 505 (8th Cir. 1986) the Eighth Circuit Court of Appeals held that Chapter 11 was designed to affect business rehabilitation and therefore "persons not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code". This Court must apply the position of the Wamsganz Court with respect to Chapter 11 eligibility.

In the case sub judice the Debtor agues that he is engaged in two "businesses": energy consulting and fund raising. Although the Debtor has performed energy consulting services in the past for IEC, (which services have not been performed since 1985) he was neither

engaged as an energy consultant on October 2, 1987, the date this case was converted to a Chapter 11 proceeding; nor has he performed any such services since the conversion of the case. Thus, under the standard recited by the Wamsganz Court, energy consulting would not provide a sufficient basis for a determination of eligibility under Chapter 11.

Addressing the Debtor's secondary "business" of fund raising, this Court similarly finds an insufficient basis for a finding of Chapter 11 eligibility. Pursuant to the Debtor's testimony it is this Court's understanding that his fund raising endeavors comprise only a temporary occupation and do not constitute the "business" which the Debtor is seeking to reorganize within the context of this Chapter 11 proceeding. As the schedules and the testimony indicate the debts

sought to be satisfied by this Chapter 11 case were incurred primarily in connection with the Debtor's energy consulting services for IEC and the Debtor's education. The fund raising "business" which the Debtor claims a desire to reorganize had not even begun on the date of the Chapter 7 filing, and had begun only 5 months prior to the conversion to Chapter 11. The debts outstanding in this case bear no connection to the Debtor's fund raising endeavors, and were incurred prior to the Debtor engaging in fund raising. Additionally, because the Debtor's compensation for his fund raising activities includes a percentage fee for what he raises on top of a total reimbursement for all of his expenses, the Debtor cannot incur any additional debt in connection with his fund raising "business", thus making it an unlikely

Chapter 11 reorganization candidate. Since the Debtor has no office, no employees, no known business assets or liabilities and incurs no expenses which are not reimbursed; he has failed to demonstrate that there is a "business" to reorganize, and how such a reorganization could be effected.

Based upon the evidence and testimony presented in this case, this Court believes that this Debtor wishes to employ the Chapter 11 process to enable him to resume his energy consulting work in connection with IEC. Because, however, the Debtor is not currently engaged in the business of energy consulting, and because his current occupation of fund raising is completely unrelated to the over $140,000.00 of debt involved in this case (and is not the entity sought to be reorganized herein), this Court finds no

ongoing business which satisfies the Chapter 11 eligibility requirements as delineated in the Eighth Circuit's Wamsganz case. An Order consistent with this Memorandum Opinion requiring the Debtor to either convert the case to one under Chapter 7 of the Bankruptcy Code or face dismissal shall be issued simultaneously herewith.

/ss/ Barry S. Schermer
BARRY S. SCHERMER
UNITED STATES BANKRUPTCY JUDGE

Dated: August 1, 1588
St. Louis, Missouri

Copy mailed to:

Sheldon Baruch Toibb
Debtor
8640 Olive Boulevard - Apt. A
St. Louis, Missouri 63132

Audrey G. Fleissig
Attorney for Debtor
720 Olive Street - 24th Floor
St. Louis, Missouri 63101

Stuart J. Radloff
Trustee
7777 Bonhomme Avenue - 14th Floor
Clayton, Missouri 63105

IN THE SUPREME COURT OF THE UNITED STATES

In Re:	)
	)
SHELDON BARUCH TOIBB	)
	)
Petitioner,	)
	)
	)
	)
STUART J. RADLOFF, Trustee,	)
	)
Respondent.	)

AFFIDAVIT OF SERVICE

I, SHELDON BARUCH TOIBB, hereby state under penalty of perjury that three (3) copies of petioner's Petition for Writ of Certiorari in the cause hereinabove were mailed by me, First Class, postage prepaid, this 28th day of August, 1990, to Stuart J. Radloff, Esq., 7777 Bonhomme, 14th Floor, Clayton, Missouri 63105.

Sheldon Baruch Toibb

STATE OF MISSOURI)
)
ST. LOUIS COUNTY)

Subscribed and sworn to before me this 28TH day of August, 1990.

Jonathan Belsky
Notary Public

My Commission Expires:

JONATHAN BELSKY
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXP. FEB. 16,1991